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IN THE

Supreme Court of the United States

AMERICAN INSURANCE COMPANY AND
COLUMBIA CASUALTY COMPANY,
Petitioners,

v.

ASTENJOHNSON, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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IN THE

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No. 09-254

AMERICAN INSURANCE COMPANY AND
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Petitioners,

v.

ASTENJOHNSON, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR PETITIONERS

This case warrants the Court's review. As the petition demonstrated, the courts of appeals are sharply divided on the specific question presented by this case: whether a plaintiff who has no claim for damages or other legal relief—and thus no right to a jury trial—can nonetheless obtain a jury trial by adding a declaratory judgment count. Moreover, that division of authority reflects a broader confusion among the lower courts regarding the important constitutional issue of when the Seventh Amendment jury trial right applies in declaratory judgment actions.

Asten's efforts to distinguish the decisions of other courts of appeals are unavailing. Those decisions squarely hold that where a plaintiff has no viable "legal" claim entitling it to a jury trial, it cannot obtain a jury trial simply by framing its suit as a claim for declaratory relief. But that is exactly what happened here: the Third Circuit erroneously concluded that Asten, having failed to demonstrate damages necessary to establish its "only legal claim" (App. 14a), nevertheless was entitled to a jury trial because it had requested declaratory relief on precisely the same issue. Asten's contention that the decisions of other courts of appeals involved plaintiffs with "equitable" claims, while its own declaratory judgment claim was "legal," merely begs the question.

The Third Circuit's decision was also wrong. Asten's half-hearted defense of that decision rests on a distortion of the reasoning and results in the courts below. While conceding that the district court held Asten was not entitled to a jury trial on its breach of contract claim because it could not prove damages, Asten unsuccessfully attempts to cast the Third Circuit's affirmance of that holding as a mere "general aside or observation" (Opp. 24), and argues that it had "independent proof of ... damages" that supported its "independent declaratory judgment claim" (Opp. 25). But the Third Circuit did not rely on the availability of any proof of damages; rather, it squarely held that no claim for damages was necessary, and that even where a plaintiff was *not* entitled to a jury trial on its breach of contract claim, it was still entitled to a jury trial on a declaratory judgment claim arising from the same contractual dispute. Asten makes no attempt to address, let alone resolve, this logical contradiction.

Contrary to Asten's contentions, this case is an ideal vehicle for the Court's review of the question presented. The Third Circuit's decision squarely ruled on the jury trial question, and thus voided the outcome of a lengthy bench trial. This Court should grant review to resolve the division of authority among the courts of appeals and answer this important constitutional question.

I. THE COURTS OF APPEALS ARE DIVIDED

Asten cannot dispute that in this case, the Third Circuit did exactly what other courts of appeals have refused to do: it held that a plaintiff in a non-inverted suit that otherwise has no claim for "legal" relief could nevertheless obtain a jury trial by appending a claim for declaratory judgment. That conclusion directly conflicts with the principle applied by other courts of appeals that "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 662 (6th Cir. 1996); *Manning* v. *United States*, 146 F.3d 808, 812 (10th Cir. 1998); *see Marseilles Hydro Power, LLC* v. *Marseilles Land & Water Co.*, 299 F.3d 643, 649 (7th Cir. 2002) (a plaintiff "cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment").

Asten seeks to distinguish the decisions of other courts of appeals by asserting that those cases involved claims that were "indisputably equitable" (Opp. 13), while its own declaratory judgment claim is "legal." But that only begs the very question at issue in this case—namely, how to determine what constitutes a "legal" or "equitable" declaratory judgment claim in a non-inverted context. Asten, consistent with the Third Circuit, would resolve that question by looking princi-

pally to the nature of the *issue* underlying its declaratory judgment claim. *See, e.g.*, Opp. 14, 16. Other courts of appeals have instead focused on the nature of the *relief* available to the declaratory judgment plaintiff and have refused to find a jury trial right where the plaintiff had no claim to legal relief. That difference lies at the heart of the courts of appeals' conflicting approaches to the question in this case.

Marseilles is instructive. There, the Seventh Circuit rejected the plaintiff's contention that its original complaint had given rise to a jury trial right because it included an issue that "*could* give rise to a claim for damages." *Marseilles*, 299 F.3d at 648. Not so, the court held. Rather, a suit that does not involve a claim for "legal" relief does not give rise to a jury trial right "regardless of the nature of the issues likely or even certain to arise in the case," even though most of those issues "indeed might be legal, such as whether the [defendant] broke its contract with the [plaintiff], an issue normally determined by the common law of contracts rather than by some principle of equity jurisprudence." *Id.* (citation omitted).

The Seventh Circuit regarded this distinction—between the underlying issue and the claim for relief—as critical. Expressly declining to look to the "nature of the underlying dispute," the court instead focused on the nature of the plaintiff's claim. 299 F.3d at 649 (internal quotation marks omitted). As the court explained, "The 'nature of the underlying dispute' here is breach of contract, but a plaintiff who is seeking equitable relief and not damages cannot wrest an entitlement to a jury trial by the facile expedient of attaching a claim for declaratory judgment." *Id.* In other words, where there is no claim for legal relief, there is no jury

trial right—whether or not a declaratory judgment is sought.[1]

Likewise, in *Golden*, the Sixth Circuit held that a request for declaratory judgment was not a "legal" claim entitling the plaintiffs to a jury trial where they otherwise had no claim for legal relief. There, the court examined the nature of the principal relief sought by the plaintiffs—which included injunctive and monetary relief—and concluded that "the plaintiffs do not assert legal rights in this case." *Golden*, 73 F.3d at 661. The court then explained that the fact that "plaintiffs seek a declaration of rights under the Declaratory Judgment Act does not alter our conclusion," because "[s]eeking declaratory relief does not entitle one to a jury trial where the right to a jury trial does not otherwise exist." *Id.* at 661-662 (citation omitted). Indeed, Judge Boggs's dissent specifically criticized the majority for "us[ing] an inquiry into remedies to make a patently legal issue equitable." *Id.* at 664 (Boggs, J., dissenting).

In short, other courts hold that a request for declaratory judgment cannot convert a non-inverted suit that includes a legal issue, but no claim for legal relief, into a "[s]uit[] at common law" entitling the plaintiff to a jury trial. U.S. Const. amend. VII; *see also Manning*, 146 F.3d at 812 ("fact that [plaintiff] requested a declaratory judgment, in connection with the injunctive relief, did not alter the basic equitable nature of his action"); *Northgate Homes, Inc.* v. *City of Dayton*, 126

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[1] As the above discussion demonstrates, Asten is simply wrong in asserting (Opp. 14) that *Marseilles'* distinction between the plaintiff's claim for relief and the nature of the underlying "issue" concerned only the meaning of "issue" in Federal Rule of Civil Procedure 38(b).

F.3d 1095, 1098-1099 (8th Cir. 1997). That rule is not limited to "indisputably equitable" claims, as Asten contends (Opp. 13), but rather applies to any non-inverted suit in which there is no claim for legal relief. It thus conflicts with the Third Circuit's approach here and would lead to a different result in Petitioners' case. Asten fails to recognize that in having no claim for a legal remedy, it is in the same position as any other party that has brought a cause of action that raises legal "issues" but asserts no viable claim for legal relief. Under the rule applied by other circuits, it cannot simply manufacture a jury trial right by tacking on a declaratory judgment claim.

II. The Decision Below Is Wrong, And This Case Is An Excellent Vehicle For Resolving The Question Presented

1. The Third Circuit concluded that Asten was entitled to a jury trial on its request for declaratory judgment despite also holding that the district court properly struck Asten's jury trial demand on its "only legal claim" for breach of contract—even though the two claims involved precisely the same underlying issue. App. 14a. Asten nevertheless contends that there is no inconsistency in the court of appeals' reasoning. That cannot be right.

As an initial matter, Asten incorrectly contends (Opp. 24) that the court of appeals' conclusion regarding its breach of contract claim was a mere "general aside or observation." To the contrary, the Third Circuit expressly concluded that "the District Court was entitled to find that Asten was unable to prove recoverable damages at trial and to rely upon that fact in resolving the Seventh Amendment issue before it." App. 13a. The Third Circuit thus affirmed the district court's de-

nial of Asten's jury trial demand with respect to its breach of contract claim.

It is true, of course, as Asten contends (Opp. 24), that the court of appeals regarded the declaratory judgment claim as a separate basis on which Asten might be entitled to a jury trial. Indeed, that is precisely the issue in this case: whether the court of appeals correctly held that Asten's declaratory judgment claim entitled it to a jury trial even though the court recognized that Asten's parallel breach of contract claim was not "legal" for Seventh Amendment purposes and did not give rise to a jury trial right.

Asten has remarkably little to say in defense of that conclusion. Indeed, it does not defend at all the central premise of the Third Circuit's analysis, and the one that puts it in conflict with other courts of appeals: the court's assumption that to obtain a jury trial on its declaratory judgment claim, it was unnecessary for Asten to show an entitlement to legal relief. *See* App. 21a (describing Asten's declaratory judgment claim as a claim "filed in anticipation of harm but before harm has been suffered"). Rather, Asten claims (Opp. 25) that it offered "independent proof of ... damages ... suffered from the Petitioners' breach" that supported its "independent declaratory judgment claim for legal relief." That is simply not true: the district court and the Third Circuit were in agreement that Asten had not supplied *any* proof of damages it had suffered. But while the district court correctly recognized that Asten was therefore not entitled to a jury trial on either its breach of contract or its declaratory judgment claim, the Third Circuit erroneously held that Asten's lack of entitlement to legal relief barred a jury trial on the breach of contract claim but not on the declaratory judgment claim arising from the same purported breach. Asten

makes no attempt to reconcile that contradiction or to defend the incorrect legal premise that underlies it.[2]

2. Nor does this case represent a mere "internal circuit split" (Opp. 28), in which a court of appeals issues inconsistent decisions because it fails to note the existence of relevant prior precedent. Rather, the decision below acknowledged the Third Circuit's previous decision in *Owens-Illinois, Inc.* v. *Lake Shore Land Co.*, 610 F.2d 1185 (3d Cir. 1979), which held that where a plaintiff's action was "not an inverted law suit, but rather a claim cast in declaratory judgment form because the right to specific performance had not ripened at the time the action was filed," the plaintiff was not entitled to a jury trial. *Id.* at 1189-1190. In purporting to apply that analysis to the set of facts presented here, however, the Third Circuit effectively created a new rule under which a plaintiff in a non-inverted declaratory judgment action is entitled to a jury trial whenever the underlying issue—here, breach of contract—is of the type that *could* at some point conceivably give rise to a claim for legal relief. The upshot of the Third Circuit's reasoning is that a plaintiff with a colorable "legal" issue can obtain a jury trial simply by framing its request as one for declaratory relief, even though it cannot muster the essential elements of a legal claim. It is precisely that new rule that has put the Third Circuit in conflict with other courts of appeals. Indeed, the Seventh Circuit has relied on the principles articulated

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[2] Asten also erroneously states (Opp. 7-8) that "Columbia had asserted its own breach of contract counterclaim which was a further reason to accord Asten its jury trial demand." Again, this evidences Asten's confusion between a claim that raises a "legal issue" and a claim for legal relief: Columbia's counterclaims sought the equitable remedies of reformation and rescission.

in *Owens-Illinois* to reject the very premise on which the Third Circuit relied in this case and reach the opposite conclusion on essentially identical facts—confirming that the Third Circuit has indeed departed from the rule prevailing in other courts of appeals. *See Marseilles*, 299 F.3d at 648-649 (citing *Owens-Illinois* but rejecting argument that "if an issue *could* give rise to a claim for damages, either party can demand that it be tried to a jury").

At points, Asten appears to contend that it is appropriate, in determining whether a jury trial is necessary, to focus on the nature of the underlying issue rather than the nature of the available relief. *See, e.g.*, Opp. 16. While that is indeed what the Third Circuit did here, other circuits have expressly rejected such an analysis. *See, e.g., Marseilles*, 299 F.3d at 649; *Golden*, 73 F.3d at 660. Indeed, such focus on the underlying *issue* is exactly what has caused uncertainty in the lower courts. *See Crocker* v. *Piedmont Aviation, Inc.*, 49 F.3d 735, 745 (D.C. Cir. 1995); *Marseilles*, 299 F.3d at 648-649; Pet. 24-26.[3] Undue focus on the issue, rather than the plaintiff's claim for relief, can lead courts, as in this case, to conclude that an action is legal even where the requisites of a legal claim are absent.

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[3] In this regard, Asten contends (Opp. 31-32) that the petition misrepresents the plurality opinion in *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 565 (1990). Not so. Petitioners' point is not that *Terry* misstated the governing rule—it did not—but rather that lower courts have openly struggled with *Terry* in determining whether a particular issue is legal or equitable given that "most traditional issues could be tried in both contexts." *Crocker*, 49 F.3d at 745; *see also Marseilles*, 299 F.3d at 648-649.

3. Finally, notwithstanding Asten's contention (Opp. 28) that review would be "premature," this case presents a significant issue implicating both the scope of an important constitutional right and district courts' day-to-day management of their caseloads. It warrants this Court's review now.

This case itself graphically demonstrates the problem. The district court reached a decision and issued detailed findings of fact and conclusions of law after a three-week bench trial, during which the court heard substantial testimony regarding Asten's insurance program, the negotiation of the policies, and the course of dealings between the parties. Yet the district court's efforts were nullified by the Third Circuit's decision holding that the court was right not to hold a jury trial on Asten's breach of contract claim, but was wrong not to do so on the same issue when it was framed as a request for declaratory relief.

The Third Circuit's decision adds further uncertainty to an area of law that already has more than its share. The decision suggests that trial courts should avoid bench trials whenever there is a colorable "legal" issue rather than risk wasting their limited resources on trials that may later be invalidated under a highly indeterminate rule. And it invites plaintiffs to frame their "legal" issues as declaratory judgment claims to secure jury trials to which they would not otherwise be entitled. The Court should grant review to make clear that the Third Circuit's approach is not the law.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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